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IN THE  
**Supreme Court of the United States**

October Term, 1988

DINO BELLO, an individual, and  
SIMMONS PARK PROPERTIES, INC.,  
a corporation,

*Respondents,*

vs.

NORMAN L. WALKER, JOHN E. KANON,  
JAMES M. MARTIN, JOSEPH J. URBANOWICZ,  
HARRY E. BABINGER, JAMES E. HADSEL,  
YVONNE A. RIGATTI, GLENN TRAUTMAN,  
WILLIAM W. RUHL, WILLIAM G. DODDS,  
PATRICIA M. PRICE, CONCETTA SERDY,  
and REID W. MCGIBBENY, individuals,

*Petitioners.*

DINO BELLO, an individual and  
SIMMONS PARK PROPERTIES, INC.,  
a corporation,

*Respondents,*

vs.

MUNICIPALITY OF BETHEL PARK,

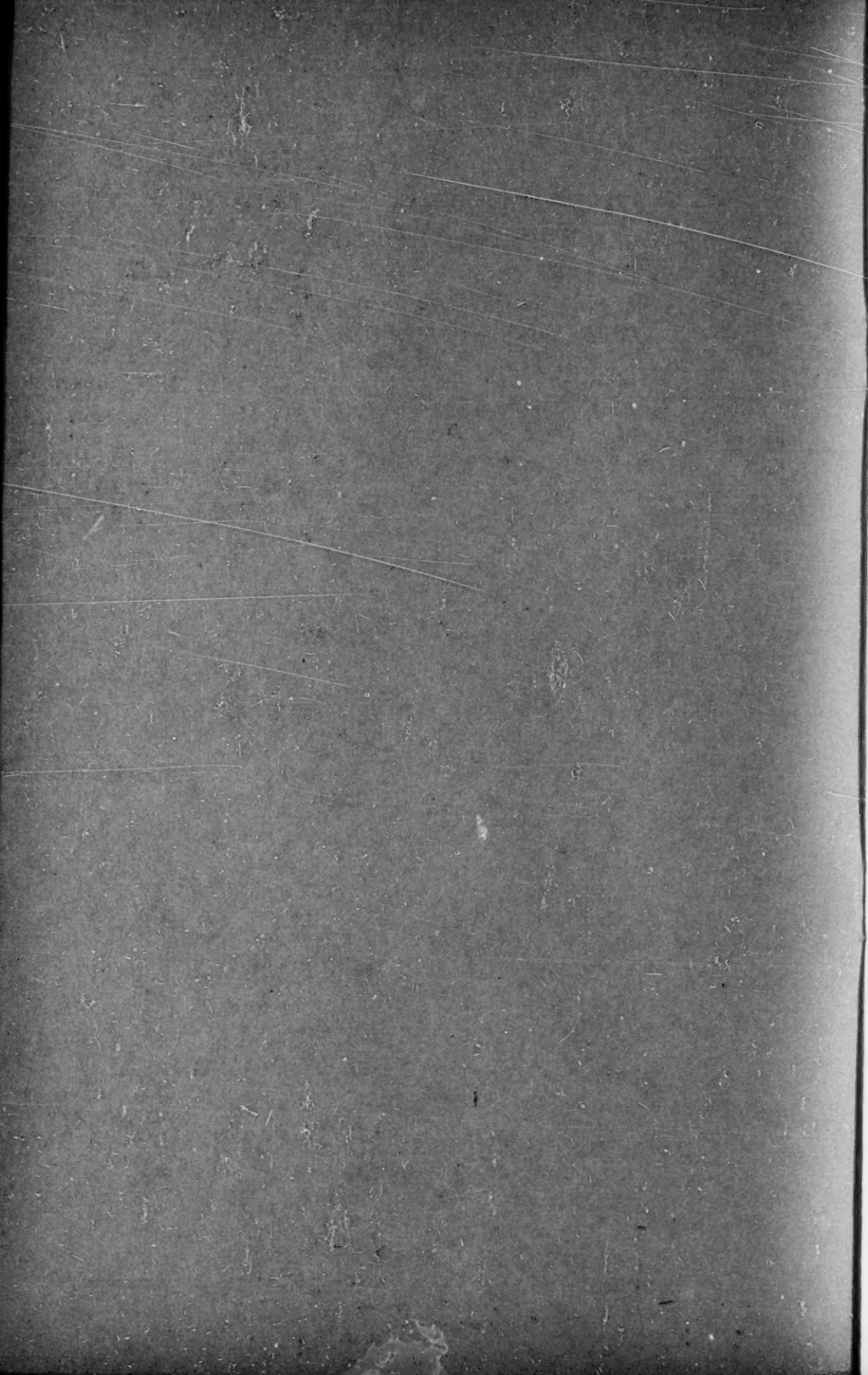
*Petitioner.*

ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE THIRD CIRCUIT

**BRIEF IN OPPOSITION TO  
CROSS-PETITION FOR WRIT OF CERTIORARI**

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i.

**COUNTERSTATEMENT OF QUESTIONS  
PRESENTED FOR REVIEW**

I. WHETHER IT HAS BEEN ESTABLISHED  
THAT THE MUNICIPALITY ACTED THROUGH A  
MINORITY OF COUNCIL MEMBERS?

II. WHETHER THE RATIONAL RELATIONS  
TEST IS APPLICABLE?



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**BRIEF IN OPPOSITION TO  
CROSS-PETITION FOR WRIT OF CERTIORARI**

The respondents file the following Brief in Opposition to the Cross-Petition for Writ of Certiorari to the Supreme Court of the United States.

### Counterstatement Of The Case

The cross-petition for Writ of Certiorari filed in behalf of the cross-petitioners continues to deliberately misstate the basic facts in the case, as cross-petitioners have done throughout the litigation. A site plan was approved by the Council of Bethel Park on October 19, 1976 for 47 units, with the balance of the site approved for 204 units on December 12, 1976, with **no phasing requirement**. The developer finished the first 47 units by May of 1979, and began requesting building permits for the additional 204 units for which site plan approval had been obtained in December of 1976. The Municipal officials and Municipality denied the permits for any additional units.

The five-phase plan for the development had been abandoned before any site plan approvals were submitted to the Council of Bethel Park. The plans considered and approved in October and December of 1976 contained no phases. The earlier five-phase plan, although never submitted nor the subject of any site plan approval, was dredged up by the Municipal officials in May of 1979 as one of a number of pretexts for denying the building permits for the remaining 204 units.

Multiple applications for building permits were submitted and denied during the Spring and Summer of 1979. An action in mandamus was filed in State Court to compel the issuance of such building permits. The mandamus action ultimately resulted in a finding that there was no phasing requirement in any site plan approval by the Municipality, and that the developer had a clear right to all the permits.

The developer filed Complaints in the United States District Court for the Western District of Pennsylvania against Bethel Park's council members, the building



official, Municipal manager and the Municipality itself seeking monetary damages for violations of the developer's rights pursuant to the Fifth and Fourteenth Amendments of the United States Constitution and 42 U.S.C. §1983. The developer claimed a violation of due process of law and a taking without just compensation.

The District Court granted the defendants' Motion for Summary Judgment in its entirety. The developer appealed to the United States Circuit Court for the Third Circuit. By Opinion filed March 1, 1988, the Third Circuit held that the developer had asserted sufficient fact to demonstrate a violation of its rights to substantive due process in the nature of a deliberate and arbitrary abuse of government power by an interference with the issuance of building permits. The Third Circuit stated that the developer had presented evidence from which a factfinder could reasonably conclude that the action of council members acting in their capacity as officers of the Municipality improperly interfered with the process by which the Municipality issued building permits, and that they did so for partisan, political or personal reasons unrelated to the merits of the application for the permits. These actions, according to the Third Circuit, if proven, are sufficient to establish a substantive due process violation actionable under §1983.

**Reasons Relied Upon For The Denial  
Of The Cross-Petition**

**A. It Has Not Been Established That The Municipality Acted Through A Minority Of Council Members.**

The cross-petitioner concedes that the rationale given by the Third Circuit with regard to the individual defendants is consistent with prior decisions of this court. However, the cross-petitioner argues that there is no legal basis for holding in the Municipality of Bethel Park if only a minority of the members of council acted. Whether a minority of council members acted, or whether certain of the council members who had the personal and political animus caused the entire Council or a majority thereof to act to deny the permits, is a factual issue that must be decided upon a full trial of the case. It is a matter of proof at trial as to just how many council members had improper motives and how many of the other council members may have been tainted by those who had the improper motives.

There is evidence that the entire Council met as a zoning committee and passed on applications for building permits, and evidence that the applications for building permits of the developer came before the entire Council acting as a zoning committee. The decision of such body, which can act only by a majority vote, was to withhold such building permits.

The Third Circuit reversed the grant of summary judgment in behalf of the Municipality of Bethel Park, but did not hold the Municipality liable. It gave the developer the chance to prove its case at trial. The issues on the substantive due process question are not clear enough at this juncture for the Supreme Court to make

any kind of fact-based ruling. As to how many Council members had improper motives and how many of the other council members may have been tainted by those who had the improper motives is a matter for trial. The developer has put forth evidence and will do so at trial to establish that the Municipal Council acted as a body by majority vote, influenced by members with personal and political motives to stop the development.

The cross-petitioners again misstate the facts in this first argument. It was not one permit denied by the zoning officer, but multiple permit applications denied by the Council acting as a body by a majority, which then engaged the manager, planner and building official to implement and communicate such decision of denial.

This case does not deal with a negligent deprivation of rights, nor mere tortious acts of negligence. Rather, the decision to deny the permits was based on improper motives and was a deliberate and arbitrary abuse of government power. As such, it became a matter of Municipal policy since the Council, in multiple meetings, effected a series of consistent decisions to deny the applications for building permits that came in during the Spring and Summer of 1979. The Municipal Council acted as a body under Pennsylvania law and is therefore a supervising policy maker under the circumstances. There was not, as misstated by cross-petitioner, only a single isolated incident of the denial of a permit, but a series of denials which became usage and custom until such time as the developer filed and successfully prosecuted the mandamus action to compel the issuance of all such permits. The Municipal Council, as the developer will prove at trial, and which opportunity the Third Circuit has given the developer, is that the Council made a deliberate choice to follow the course of action to

deny the permits. The alternative was to permit the issuance of the permits since the developer had a clear right to such permits pursuant to the site plan approval of December 12, 1976 for the development of 204 units, without any stipulation with regard to phases.

#### **B. Inapplicability Of Rational Relations Test.**

All that the Third Circuit did was reverse the granting of the Municipality's Motion for Summary Judgment. Cross-petitioner has concocted an argument that results in a hitherto unimaginable warping of the Fifth and Fourteenth Amendments' due process clauses. Cross-petitioner argues that its grant of summary judgment on the substantive due process claim should have been upheld by the Third Circuit because cross-petitioners claim there can be a due process violation only if there is no debatable issue of material fact, as cross-petitioner argues at page 12 of its cross-petition.

The general standard for the granting or denial of a summary judgment motion is whether there is a genuine issue of material fact to be decided by the jury or court. Where there is, as here, a genuine issue as to whether the Municipality abused its power or acted without a rational relationship to a legitimate government purpose, no summary judgment may be granted. This is precisely what the Third Circuit held when it reversed the District Court's grant of summary judgment. The case was sent back for trial to determine if in fact the developer can prove its claim.

Cross-petitioner is attempting to have its case disposed of on the Affidavit by the code enforcement official that he denied the permit because of the phasing sequence, and is now asking the Supreme Court that since there is an alleged debatable issue of material fact (*i.e.*, that there

arguably *may* be a rational reason for supporting the permit denial) it should have its summary judgment victory affirmed. This rationale would result in all substantive due process police power cases being disposed of by summary judgment. Cross-petitioner would have no substantive due process case ever go to trial. The Supreme Court should not waste its precious judicial resources on a due process issue that has yet to be fully developed at a trial.

Cross-petitioner confuses cases where there was a denial of zoning approval with the instant case which involves the denial of building permits for no rational governmental purpose *after* all zoning approvals had been achieved. The Third Circuit's decision is in conformity with those cases involving the wrongful and malicious interference with the issuance of permits where there was no basis for withholding such permits, cases where all zoning approvals had been previously obtained as in this case. The case of *Scott v. Greenville County*, 716 F.2d 1409 (4th Cir. 1983) is a case directly in point where the legislative body intervened in the Municipality's ministerial permit issuance process for reasons of political and personal motives without any conceivable rational basis. The *excuse* given by the Municipality of Bethel Park regarding phasing was found to be totally without merit since the State Court granted the developer's request for mandamus which entails a showing that the developer had a clear right to the permits and the Municipality a corresponding duty to grant them.

**CONCLUSION**

For all of the foregoing reasons, the petitioners respectfully request that this court deny the cross-petitioner's Petition For Writ of Certiorari.

Respectfully submitted,

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